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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1871

ARNOLD DANIEL NOGA and
ROBERT HENRY VALEZ,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 3-8745—WO. 3-8732

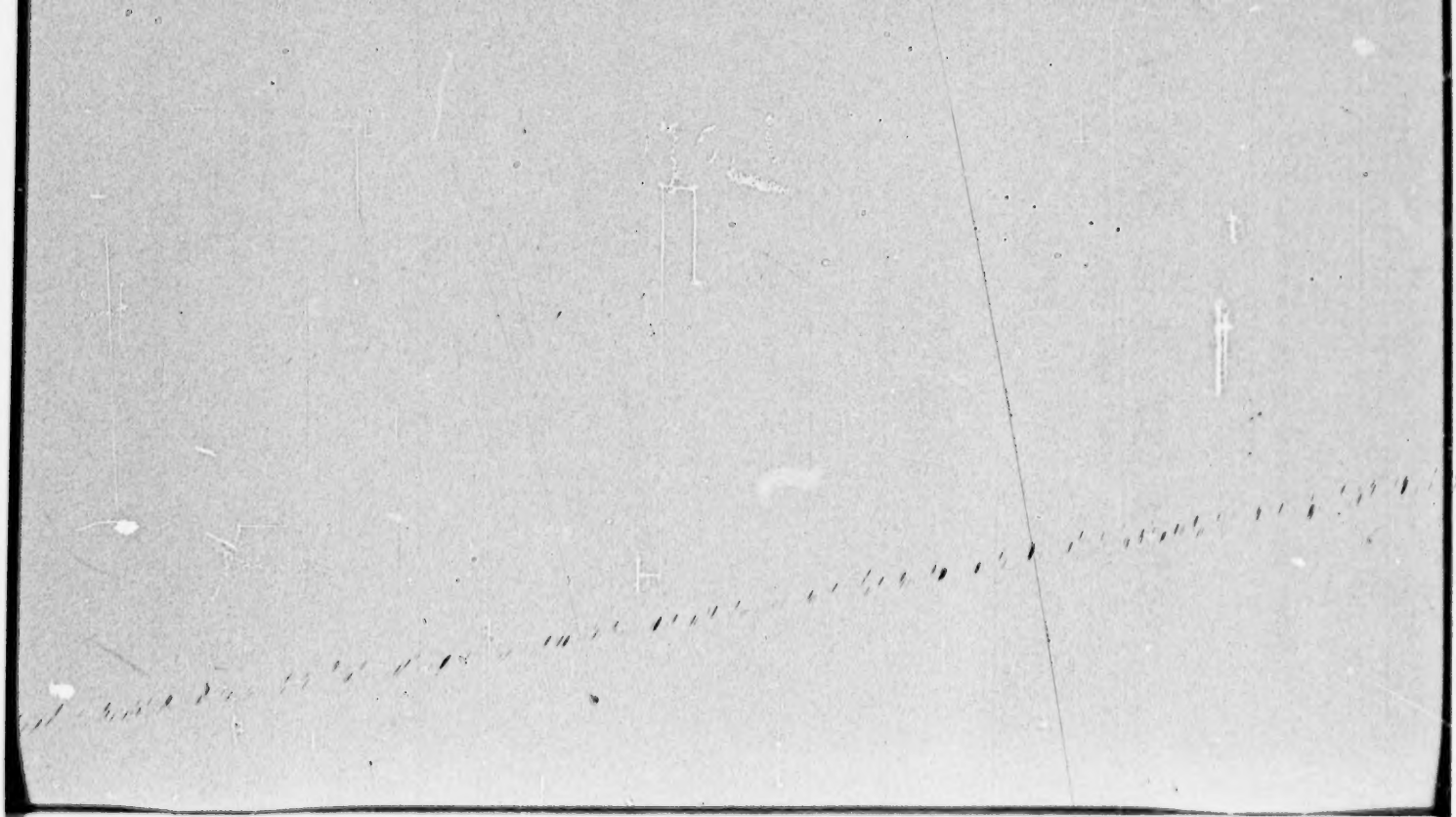


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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Arnold Daniel Noga and Robert Henry Valez, by and through their attorneys, Frederick R. Bellamy and Neil H. Fink, Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit, affirming their conviction on four counts of theft and knowing receipt of stolen goods which were moving in interstate commerce in violation of 18 USC §659, one count of conspiracy to possess goods which they

knew to have been stolen from an interstate shipment in violation of 18 USC §371, and one count of willful destruction of property moving in interstate commerce in violation of 15 USC §1281.

OPINION BELOW

(Unreported, set forth in full as Appendix A, hereto.)

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was filed May 15, 1974. The jurisdiction of this Court is invoked under USC §1254 (1).

QUESTIONS PRESENTED

When the petitioners' characters were not in issue, and when the prosecution was not introducing evidence of other crimes in order to show motive, intent, common scheme or plan, does the trial court's permitting the key government witnesses to make gratuitous, unsolicited comments concerning the possession and use of narcotics by the petitioners infringe upon petitioners' rights to a fair trial and constitute reversible error.

STATEMENT OF THE CASE

Arnold Daniel Noga and Robert Henry Valez, defendants-petitioners, hereinafter referred to as "petitioners" were charged in a six count indictment on October 15, 1972. The first four counts related to the theft and knowing receipt of stolen goods moving in interstate commerce in violation of 18 USC §659; in the fifth count they were charged with conspiracy to possess stolen goods which were part of an interstate shipment in violation of 18 USC §371; the sixth charge was willful destruction of property moving in interstate commerce in violation of 15 USC §1281.

The petitioners entered pleas of not guilty at the time of their arraignment, November 8, 1972. Trial by jury commenced on January 23, 1973, before the Honorable Cornelia Kennedy, in the United States District Court for the Eastern District of Michigan, Southern Division. The government's two principal witnesses were Christian Verlin McAllister and Blackburn Lee Baldwin, an admitted paid informant for several government agencies. Both Mr. McAllister and Mr. Baldwin had been arrested and indicted along with the defendants on the above enumerated charges. Their testimony indicated that on Sunday morning, September 10, 1972, pursuant to an earlier agreed upon plan for the "robbery" of a warehouse, Mr. Noga, Mr. Baldwin and Mr. McAllister drove to the Bird Leasing & Cartage Company in Detroit and then to Gil Main's Truck Stop to obtain an empty truck and trailer. Having acquired the truck and a North American Van Lines trailer, they proceeded to the Village Inn Restaurant in East Detroit, Michigan, where they inspected the trailer and discovered that it contained merchandise. At that time, Mr. Noga

telephoned Mr. Valez, who arrived at the Village Inn shortly thereafter. Testimony from the petitioners indicated that on that same Sunday, September 10, 1972 at 9:00 a.m., Mr. Noga and Mr. Valez were each separately awakened in their respective homes by a telephone call from Mr. Baldwin, who told them that he was at the Village Inn Restaurant with a truckload of furniture which he had taken out of storage, and which he needed help in moving into the house which Mr. Baldwin was supposedly buying from Mr. Valez.

According to government witnesses, the four men then proceeded to Mr. Valez' house on Joy Street in St. Clair Shores, Michigan. As they began unloading the furniture they were interrupted by St. Clair Shores police who informed them that the house was condemned, and that they could not leave the furniture there. The four men then decided to take the truck and furniture to the house of Darlene Durk, the sister of Mr. Noga.

The furniture was unloaded at Miss Durk's house in Brighton, Michigan around noon Sunday, September 10, 1972, after which the truck and trailer were driven into a field near Brighton, doused with gasoline by Mr. Noga and Mr. McAllister and ignited.

Mr. McAllister's visit to the Brighton State Police Post on Tuesday, September 12, 1972, during which he informed the police of Sunday's events resulted in the initiation of a police surveillance of Miss Durk's house and of the petitioners. On Wednesday evening, September 13, 1972, Mr. Baldwin, Mr. McAllister, Mr. Noga and Mr. Valez loaded the furniture into a U-Haul truck which Mr. Noga had rented and began driving toward Detroit. At this point they were arrested by the Michigan State Police.

According to the petitioners' testimony, having unloaded the trailer at Miss Durk's house, Messrs. Noga and Valez returned to Detroit leaving Mr. Baldwin and Mr. McAllister in Brighton. Petitioners disclaimed any knowledge of the burning of the trailer. Petitioners returned to Miss Durk's house on Tuesday, September 12, 1972, to examine the items removed from the trailer, and met with Messrs. Baldwin and McAllister the following day. It was then, Wednesday, September 13, 1972, that Mr. Baldwin and Mr. McAllister informed the petitioners that the trailer and its contents had been stolen. Mr. Noga rented a U-Haul truck which the men loaded with the stolen furniture. They were proceeding toward Detroit when they were arrested. In the course of the government witnesses' testimony, the following exchanges took place:

Q. (By Mr. Kelley, continuing): At the time, were you using narcotics?

A. No, I wasn't addicted to any type of narcotics.

Q. My question is use and I don't mean addiction by that term.

A. If psychedelics are determined narcotics, yes.

Q. Okay. We'll assume psychedelics are narcotics—

A. Yes.

Q. *On this occasion, were you using narcotics?*

A. *That night, yes, we were all using it.*

Q. What were you using that—

A. Myself, I took some LSD; Chris took some LSD—

Q. When you use the term LSD, are you referring to what you believe to be LSD or do you have any real knowledge?

* * * * *

Q. And where did this meeting take place?

A. Bob's home.

Q. *And what occurred at this meeting?*

A. *I believe we smoked some grass and had a few drinks, got to conversing about it and decided we'd take a ride down. Bob decided we'd take a ride down.*

• • • • •

Q. And upon arriving at the Valez residence, what did you do?

A. I got out of the car with Bob and Diane and Arnie and we went into the house. We left Chris out in the car.

Q. *And what did you do inside the house?*

A. *We smoked some grass. Arnie sat on the couch and more or less went into slumber. I believe Diane went on the bed. Bob and I sat up.*

He gave me a couple pieces of speed so I could stay awake.

Q. And what happened after that Mr. McAllister?

A. *We got stoned, sir and we drank a beer and we left the bar, sir.*

• • • • •

A. The night of the Mexican Festival in Detroit.

Q. What date was that?

A. I believe it was September 9?

Q. Yes.

A. *We all got together at Mr. Valez's house and we had some different kind of narcotics and we did most of the festivals.*

On the way down, they showed—excuse me, we went —they showed us the Art Van store and the set-up, sir.

Q. Who was with you at that time again?

A. Mr. Valez, with Mr. Noga and Mrs. Valez.

Q. And then what happened?

A. *From there, we returned to Mr. Valez's house. I believe we smoked some grass.*

Mr. Van Dam: Your Honor, I'm sorry, I don't mean to keep interrupting, but I am getting a little concerned about the gratuitous remarks Mr. McAllister is making. They have absolutely nothing to do with this and I would ask you to ask the jury to disregard them.

The Court: Well, I will overrule that objection. It's possible they could have some relationship to the state of mind of the parties.

Mr. Van Dam: Thank you, your Honor.

Mr. Kelley: Thank you, your Honor.

The Court: They're irrelevant for any other purpose, however, and should be considered only to the extent they might bear upon the state of mind of the persons—

Q. (By Mr. Kelley, continuing): Proceed—

The Court: —or their ability to remember events or matters of that nature.

[Complete text of relevant portions of the testimony is set out in Appendix B.]

* * * * *

On February 12, 1973, the jury returned verdicts of guilty against both petitioners as to all six counts of the indictment.

The Sixth Circuit Court of Appeals found no reversible error in the trial and affirmed the judgment of conviction (See Appendix A.)

REASONS FOR GRANTING THE WRIT

The presentation of evidence which is not only not germane to the proof of the offense charged in the indictment, but which is clearly prejudicial to the petitioners must constitute reversible error under all but the most exceptional circumstances. These circumstances should be defined and circumscribed by this Court, which has not recently spoken to this important aspect of evidentiary admissibility. A uniform rule is essential, most especially in criminal cases, where a defendant's right to a fair trial is severelly jeopardized by an elastic standard for the introduction of evidence of unrelated offenses. The admission of such evidence in the case at bar was plain error and the Sixth Circuit Court's affirmance will, if unreviewed, result in manifest injustice to the Petitioners, whose cause was unduly prejudiced by the repeated references to their use and possession of illegal substances.

The general rule with regard to the introduction into evidence of offenses other than those charged in the indictment is simply that such evidence is inadmissible. It is essential that the exceptions to that broad general rule, be kept within closely prescribed bounds. Such evidence may be admitted to negate a claim that the defendant did not have knowledge or intent and was therefore an innocent participant. *United States* v *Klein*, 340 F2d 547 (2d Cir 1964). Thus evidence of other offenses may be used to show intent or knowledge or lack of intent or knowledge but only when intent is an issue in the case being tried. *Baker* v *United States*, 227 F2d 376 (5th Cir 1955); *Kowalchuk* v *United States*, 176 F2d 873 (6th Cir 1949).

Evidence of other crimes may also be introduced when it is closely interwoven with the offense charged so as to

show the scheme, plan or intent of the defendant. *Banning* v *United States,* 130 F2d 330 (8th Cir 1942), *Williams* v *United States,* 272 F2d 40 (8th Cir 1959). however, such evidence is inadmissable unless it bears upon the questions of the defendant's guilty knowledge, techniques, and schemes. *Giordano* v *United States,* 185 F2d 524 (6th Cir 1950), *Kowalchuk* v *United States,* 176 F2d 873 (6th Cir 1949).

In the instant case the trial Court reasoned that it was possible that the testimony of narcotics use could have some relationship to the state of mind of the parties or their ability to remember events. Such a rationale falls within another exception. *United States* v *Jiminez-Robles,* 415 F2d 308 (9th Cir 1969). However, the relationship between the use of narcotics and other dangerous drugs and the intent required to commit the offenses charged is tenuous, and the prejudice which such testimony would engender in the jury would far outweigh any probative value that such evidence would have.

The petitioners contend that the admission of such testimony was reversible error since it influenced the jury's decision, and was not cured by the weak cautionary instruction offered. The general rule on such occasions is that if it is reasonably certain that the error did not influence the jury, or that it has only a slight effect, then the decision of the Trial Court should not be reversed. If, on the other hand, it is difficult to determine whether or not the error affected the jury's decision, then the conviction should be reversed. *Kotteakos* v *United States,* 328 US 750 (1946). "... there is a tendency to give the defendant the benefit of any substantial doubt as to whether the error is harmless." *United States* v *McMaster,* 343 F2d 176, 184 (6th Cir 1965), cert denied 382 US 818, rehearing denied, 382 US 1000 (1966).

In *South* v *United States,* 368 F2d 202 (5th Cir 1966), the defendant was charged with using interstate commerce, the United States mails, with intent to promote or facilitate illegal gambling activity. The court held that evidence of defendant's income tax forms which tended to show him as a tax evader did not prove any essential element of the charges embraced in the indictment. The evidence rather tended to prove that the defendant was guilty of another crime, a highly prejudicial intimation, which was not cured by the instructions given.

Evidence that the defendant released embarrassing photographs in an extortion attempt was introduced in a trial for attempting to defraud the Immigration and Naturalization Service. The Court held that such evidence was sufficiently prejudicial to warrant reversal. *United States* v *Kasouris,* 474 F2d 689 (5th Cir 1973). In *Giordano* v *United States, supra,* the court held that admission of evidence that a revolver was found in the suitcase of a defendant charged with transporting stolen furs in interstate commerce was prejudicial error, stating, ". . . there is here a complete absence of any evidence to show that any weapon was used in the commission of the burglary. There can be little doubt that evidence of the possession of a revolver in the hands of one accused of crime is prejudicial . . ." Testimony that the defendant threatened to shoot a witness was held to be prejudical error in a trial for the illegal sale of narcotics. *United States* v *Ramos,* 268 F2d 878 (2nd Cir 1959).

Evidence of the use of narcotics tends to inflame the prejudices of average people and to undermine their attempts to be objective. Each day the media spews out illustrations of innocent citizens being harmed by drug addicts, accounts of drug wars with attendant numbers of execution

style slayings and stories of school children seduced by pushers. This emotionally charged subject engenders vivid pictures in the minds of jurors. *Sang Soon Sur* v *United States,* 167 F2d 431, 453 (9th Cir 1948), is an oft cited case in the area under discussion. In a trial where the defendant was charged with evading income tax payments, statements that the defendant had been convicted of narcotic law violations were introduced. Defense counsel did not object at the time the evidence was received but the Court held that "evidence of the character complained of in this case has been held to be of such a prejudicial character that cautionary instructions on the part of the Court to disregard it after it has been erroneously introduced cannot cure its harmful effect. *Boyd* v *United States,* 142 US 450, (1891).

In addition, the testimony as to drug use was elicited by the prosecutor on direct examination numerous times including an extended discussion regarding the defendants use of alleged LSD. Such tactics would have a tendency to deeply impress the defendants' drug use on the mind of the jury by repetition and emphasis. The cumulative effect of the introduction of such irrelevant and prejudicial evidence has been held to require reversal. *Landsdown* v *United States,* 348 F2d 405 (5th Cir 1965).

The petitioners further contend that the weak cautionary instruction by the trial judge was insufficient to overcome the prejudicial effect of the irrelevant testimony. Assuming arguendo that any instructions could cure the error, cautionary instructions will not always suffice. In *Pierce* v *United States,* 86 F2d 949 (6th Cir 1936), reversing 13 F Supp 301 (WD Tenn), the District Court was reversed because of the United States Attorney's reference to the defendant's past difficulties with the law. Although the jury was

told to disregard these statements, the Court held that the jury would be hard pressed to free itself from the impression that the defendant was capable of committing the crime charged because of his past bad character. The instructions must be very specific in order to erase irrelevant testimony from the jury's mind. *United States* v *Farber,* 336 F2d 586 (6th Cir 1964); *United States* v *Duff,* 332 F2d 702 (6th Cir 1964). In *United States* v *Greene,* 400 F2d 847 (6th Cir 1968), the court held that "the error was such that even an immediate striking of the testimony from the case and a curative instruction would not have removed its prejudice." *Supra* at 849.

The Sixth Circuit Court's cursory treatment of important issues, citing no case law, argues the obvious prejudice to petitioner. The decision does not deal with the delicate balance which must be maintained between prejudice, it the defendants and probative value of the evidence, it disregards the very obvious and basic fact that use of drugs in this case simply has nothing whatever to do with the question of petitioners' guilt or innocence of the crimes charged. The Court facilely relies upon "no exception—no review", thus avoiding grappling with the difficult and substantial question of the obvious prejudice which reference to use of narcotics engenders in a time when public feelings have been inflamed against narcotics and narcotics users.

It is incumbent upon this Court in its rule making and supervisory capacity in federal criminal trials to strictly limit the exceptions to the general rule of not admitting in trial evidence of offenses other than those with which the defendant is charged.

CONCLUSION

It is therefore respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

NEIL H. FINK
FREDERICK R. BELLAMY

APPENDIX A

No. 73-1795

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

United States of America, Plaintiff-Appellee, v Arnold Daniel Noga and Robert Henry Valez, Defendants-Appellants.	Appeal from the U.S. District Court for the Eastern District of Michigan.

Decided and Filed May 15, 1974.

Before Weick and Miller, Circuit Judges, and O'Sullivan, Senior Circuit Judge.

Per Curiam. Appellants Arnold Daniel Noga and Robert Henry Valez were convicted of participation in a criminal enterprise which resulted in a six-count indictment returned in the United States District Court for the Eastern District of Michigan. Four counts of the indictment charged appellants and two others, Christian Verlin McAllister and Blackburn Lee Baldwin, with theft and knowing receipt of goods which were a part of an interstate shipment, in violation of 18 U.S.C. §659; one count charged them with conspiring to possess shipments in violation of 18 U.S.C. §371; and the last count charged them with willful destruction of property moving in interstate commerce, in violation of 15 U.S.C. §1281.

Two of those indicted entered pleas of guilty and testified in support of the government. The total undertaking began with the theft of a truck and trailer to accomplish the

robbery of a furniture store. It was discovered that the trailer—a furniture van—was already full of household goods. Such goods were eventually moved to a house occupied by a sister of appellant Noga in Brighton, Michigan. The truck and trailer were then destroyed. Thereafter, one of the participants, McAllister, informed the Michigan State Police of the activity and all four of the indictees were arrested while in the process of moving the stolen goods from Brighton to Detroit.

At trial, both appellants testified in denial of their participation in the crimes charged. In their appeal, however, they do not rely on insufficiency of the evidence upon which they were convicted. The only charge of error in this appeal relates to references to the use of drugs by the participants during the involved criminal activities. Such references were made during the testimony of Baldwin and McAllister. The following occurred during the direct examination of McAllister:

> "Q. And what happened after that, Mr. McAlister?
>
> A. *We got stoned,* sir and we drank a beer and we all left the bar, sir."
>
> * * * * *
>
> "A. We all got together at Mr. Valez's house and *we had some different kind of narcotics* and we did most of the festivals.
>
> On the way down, they showed—excuse me, we went—they showed us the Art Van store and the set-up, sir.
>
> Q. Who was with you at that time again?
>
> A. Mr. Valez, Mr. Noga and Mrs. Valez.
>
> Q. And then what happened?
>
> A. From there, *we returned to Mr. Valez's house. I believe we smoked some grass.*" (Emphasis supplied.)

Thereupon, defense counsel interposed the following:

"Your Honor, I'm sorry, I don't mean to keep interrupting, but I am getting a little concerned about the gratuitous remarks Mr. McAlister is making. They have absolutely nothing to do with this and I would ask you to ask the jury to disregard them."

The District Judge then ruled:

"The Court: Well, I will overrule that objection. It's possible they could have some relationship to the state of mind of the parties.

* * * * *

They're irrelevant for any other purpose, however, and should be considered only to the extent they might bear upon the state of mind of the persons . . . or their ability to remember events or matters of that nature."

Similar references are found in Baldwin's testimony:

"Q. (By Mr. Kelley, continuing): *At the time, were you using narcotics?*

* * * * *

A. *If psychedelics are determined narcotics, yes.*

Q. Okay, we'll assume psychedelics are narcotics—

A. Yes.

Q. On this occasion, were you using narcotics?

A. *That night, yes, we were all using it.*

Q. What were you using that—

A. Myself, I took some LSD; Chris [McAlister] took some LSD—

Q. When you use the term LSD, are you referring to what you believe to be LSD or do you have any real knowledge?

A. Well, as far as I knew it was acid."

* * * * *

"Q. And where did this meeting take place?

A. Bob's home.

Q. And what occurred at this meeting?

A. *I believe we smoked some grass* and had a few drinks, got to conversing about it and decided we'd take a ride down. Bob decided we'd take a ride down."

* * * * *

"Q. And upon arriving at the Valez residence, what did you do?

A. I got out of the car with Bob and Diane and Arnie and we went into the house. We left Chris out in the car.

Q. And what did you do inside the house-

A. *We smoked some grass . . . He gave me a couple of pieces of speed* so I could stay awake." (Emphasis supplied.)

Except for the above quoted exchange between defense counsel and the District Judge during the examination of the witness McAlister, no objection to the testimony relating to drugs was made. The testimony of the prosecution witness Baldwin, set out above, followed the District Judge's admonition as to the limited relevancy of the subject of drugs. No objection was made to the quoted Baldwin testimony. No request for a relevant instruction was submitted to the trial judge. Defense counsel in his closing argument made reference to the use of drugs in attacking the credibility of the prosecution witnesses.

We find no reversible error in the trial of appellants and affirm the judgment of conviction.

APPENDIX B

During the course of the trial the following took place:

Q. (By Kelley, continuing): At the time, were you using narcotics?

A. No, I wasn't addicted to any type of narcotics.

Q. My question is use and I don't mean addiction by that term.

A. If psychedelics are determined narcotics, yes.

Q. Okay. We'll assume psychedelics are narcotics—

A. Yes.

Q. *On this occasion, were you using narcotics?*

A. *That night, yes, we were all using it.*

Q. What were you using that—

A. Myself, I took some LSD; Chris took some LSD—

Q. When you use the term LSD, are you referring to what you believe to be LSD or do you have any real knowledge?

A. Well, as far as I knew, it was acid.

Q. As far as you knew it was acid?

A. Yes.

Q. As to its description, you're not certain?

A. No.

Q. It could have been some type of tranquilizer?

Mr. Van Dam: I object to that, your Honor. I object to leading the witness.

The Court: It is leading and I will sustain the objection.

A. It was that—that following Saturday.

Q. When you say that following Saturday, from what date are you projecting?

A. Well, projecting like we were at the bar on a Wednesday or Thursday and we saw him again on Saturday.

Q. All right and what was the occasion of that meeting?

A. I believe that was more or less a social meeting too and Mr. Noga was there and we got into the furniture deal again.

Q. Right and—you said Mr. Noga was there. Who else beside Mr. Noga?

A. Mrs. Valez, Chris and myself.

Q. And where did this meeting take place?

A. Bob's home.

Q. *And what occurred at this meeting?*

A. *I believe we smoked some grass and had a few drinks, got to conversing about it and decided we'd take a ride down. Bob decided we'd take a ride down.*

We climbed in Mr. Noga's car, took a ride down, looked it over.

Q. Is that the occasion at which you observed the signs on the furniture store and other articles you described—

A. Yes.

Q. —earlier in your testimony?

A. Yeah, it was then.

Q. After—when you went to the store, what did you do?

Q. Where was Mr. McAlister at this time?

A. We got back to Bob's house—and

Q. Yes.

A. He was out in Arnie's car sleeping—I don't know for a fact he was sleeping, but he was in Arnie's car laying down in the seat.

Q. What car did you go to the Mexican Festival in?

A. Mr. Noga's Pontiac.

Q. That Arnie's; is that correct?

A. Yeah.

Q. So that in between looking over the furniture warehouse and going to the Mexican Festival, you changed cars; is that correct?

A. No, sir, I am positive we were in Arnie's car the whole shot, the whole deal.

Q. So, when you looked at the warehouse you were in Arnie's car?

A. Yes.

Q. You say Mr. McAlister was in the back seat of Mr. Noga's car when you arrived back at the Valez residence?

A. Yes.

Q. And upon arriving at the Valez residence, what did you do?

A. I got out of the car with Bob and Diane and Arnie and we went into the house. We left Chris out in the car.

Q. *And what did you do inside the house?*

A. *We smoked some grass. Arnie sat on the couch and more or less went into slumber. I believe Diane went on the bed. Bob and I sat up.*

He gave me a couple pieces of speed so I could stay awake.

Q. And did you go to sleep that night?

A. Did I?

Q. Yes.

A. No, I didn't.

Q. What did occur?

A. Well, Bob and I sat there talking more or less on the furniture deal, to make sure we had everything down.

Q. And what was the conversation between you and identifying the party speaking?

A. Just myself and Bob and he said, "Make sure you got everything down pat," and I related back to him again—

Q. Can you relate the specifics of that conversation?

A. I can't relate the specifics, just a round kind of the whole thing, you know.

Q. Now, when you were discussing with Mr. Valez the whole deal, as you said, was there any mentioning of where the truck was going—the tractor was going to be procured or where the trailer was going to be procured?

A. The way it was explained, the whole works would be coming from Gil Mains Truck City but it ended up it didn't work out that way.

Q. And when was it decided the entire tractor-trailer machinery would be taken from Gil Mains?

Q. And what happened after that Mr. McAlister?

A. *We got stoned, sir and we drank a beer and we left the bar, sir.*

Q. All right.

Was there any discussion as to where you were going to store the furniture or anything of that nature?

A. No, sir.

Q. All right.

Now, was anything further done in accomplishing this plan following the discussion at the Le Chateau D'Amour Bar?

A. Yes, sir.

Q. And what was that?

A. The night of the Mexican Festival in Detroit.

Q. What date was that?

A. I believe it was September 9?

Q. Yes.

A. *We all got together at Mr. Valez's house and we had some different kind of narcotics and we did most of the festivals.*

On the way down, they showed—excuse me, we went—they showed us the Art Van store and the set-up, sir.

Q. Who was with you at that time again?

A. Mr. Valez, Mr. Noga and Mrs. Valez.

Q. And then what happened?

A. *From there, we returned to Mr. Valez's house. I believe we smoked some grass.*

Mr. Van Dam: Your Honor, I'm sorry, I don't mean to keep interrupting, but I am getting a little concerned about the gratuitous remarks Mr. McAlister is making. They have absolutely nothing to do with this and I would ask you to ask the jury to disregard them.

The Court: Well, I will overrule that objection. It's possible they could have some relationship to the state of mind of the parties.

Mr. Van Dam: Thank you, your Honor.

Mr. Kelley: Thank you, your Honor.

The Court: They're irrelevant for any other purpose, however, and should be considered only to the extent they might bear upon the state of mind of the persons—

Q. (By Mr. Kelley, continuing): Proceed—

The Court: —or their ability to remember events or matters of that nature.

A. We went down to—we decided to go to the—they said they wanted to go down to the Mexican Festival.

The five of us went to the Mexican Festival in Detroit and partied for a while.

Q. When you say five, at this point, you have only mentioned three individuals and yourself.

A. Yes, sir, Mr. Baldwin, Mr. Noga, Mr. Valez, Mrs. Valez and myself started wiping the furniture down and Mrs. Valez went to get us some gloves and we smoked some grass and drank some Scotch.

Q. All right and you stated that Mrs. Durk was present at that time?

A. Yes, sir.

Q. How much—let me ask this question in a different fashion.

Were you paid anything, at all, for your participation in these activities?

A. The night we appropriated the truck, sir, I was given $75.00 on the way home, sir, and it was explained to me that—Mr. Noga didn't have any more money because he gave Darlene $50.00 at the house. That's all he said he had and he gave the other $25.00 to Mr. —to Lee after dropping myself off at my house and that I could pick up Mr. Baldwin in the morning and give Lee a hundred dollars and an extra twenty-five for my hundred.

Q. All right and did you receive that money?

A. Yes, sir, I got seventy-five that night and I picked up twenty-five the next morning, sir

Q. All right.

Now, while you were at the house on the evening of the 13th, the house in Brighton, was there any discussion as to what was going to be done with the furniture?

A. Yes, sir.

* * * * *

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1871

ARNOLD DANIEL NOGA AND ROBERT HENRY VALEZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the admission of testimony by two witnesses concerning the use of narcotics at the time the alleged offenses were commited was plain error.

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were convicted of theft and knowing receipt of stolen goods moving in interstate commerce, in violation of 18 U.S.C. 659, conspiracy to possess stolen goods, in violation of 18 U.S.C. 371, and willful destruction of property moving in interstate commerce, in violation of 15 U.S.C. 1281. Petitioners Noga and Valez were sentenced to terms of four and five years' imprisonment, respectively. The court of appeals affirmed (Pet. App. A).

The government's case was developed largely through the testimony of co-conspirators McAllister and Baldwin, who pleaded guilty. In early September 1972, petitioners, McAllister, and Baldwin planned to rob a furniture warehouse in the Detroit area. As part of the plan, petitioner Noga, McAllister, and Baldwin stole a truck and trailer. The trailer proved to be loaded with furniture, which they and petitioner Valez sought to unload at a house in St. Clair Shores, Michigan. The police halted the unloading because that house had been condemned. The four then unloaded the furniture at a house in Brighton, Michigan, belonging to Noga's sister, after which they drove the truck and trailer to an open field and set them afire. Thereafter, McAllister informed the Michigan State Police of these activities and the four men were arrested as they were moving the stolen goods from Brighton to Detroit (Pet. 3-5; Pet. App. A, p. 16).

Co-conspirator McAllister testified that on the night the four planned to steal a truck and trailer, they all got "stoned." Thereafter, they went to petitioner Valez' home and had "some different kind of narcotics" and then went to the Art Van store, following which they returned to the Valez residence and "smoked some grass" (Pet. App. A, p. 16). At this point, petitioners' counsel objected that the gratuitous remarks of the witness were irrelevant and requested that the court instruct the jury to disregard the remarks. The court overruled the objection, saying that it was "possible they could have some relationship to the state of mind of the parties." The court did, however, caution the jury with respect to these remarks, stating (Pet. App. A, p. 17):

> They're irrelevant for any other purpose, however, and should be considered only to the extent they might bear upon the state of mind of the persons * * * or their ability to remember events or matters of that nature.

Later during the trial a second co-conspirator, Baldwin, testified that the four had met at a bar where the burglary of the furniture warehouse was planned. When the prosecutor asked the purpose of the meeting, he replied, "I think it was to buy or sell some narcotics." There was a defense objection and, at the government's request, the answer was stricken (Tr. 11-12). Baldwin then testified that all four men were using narcotics. The assistant asked if it were not possible that this was only a tranquilizer. A defense objection to this question as leading was sustained (Pet. App. A, p. 19). There was further testimony by Baldwin that the men used some "grass" and that he took some "speed" to keep himself awake (Pet. App. A, p. 18). There was no objection to this testimony.

The only objection was to McAllister's testimony and it was on the ground of its alleged irrelevancy. On this point, the trial court delivered a cautionary instruction. Petitioners now urge that "the prejudice which such testimony would engender in the jury would far outweigh any probative value that such evidence would have" (Pet. 9). In making only this new objection, petitioners do not argue that the state of mind of the parties at the time, as well as the witnesses' ability to relate the course of events, were irrelevant matters for consideration by the jury. In fact, petitioners urged in closing argument that the prosecution witnesses were unreliable because of their drug use (Pet. App. A, p. 18). This testimony was relevant and constituted an integral part of an accurate account of the entire episode. The trial court's conclusion that the testimony was probative and that its possible prejudicial effects did not outweigh its probative value was correct and, in any event, did not constitute plain error. See, *e.g.*, *United States* v. *Deaton*, 381 F. 2d 114, 117 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1974.